



Generally Speaking

Comings and Goings

Welcome to:

AAG Judy Scherger the newest attorney in the Collections and Support Section.

Suzanne Brower, LOA I in the Anchorage Torts and Workers' Compensation Section.

AAG Nehviz Calik, Anchorage Human Services Section, and **AAG Libby Bakalar** who started with the Juneau Human Services Section.

Robert Harris, the new case management clerk for the Legal Support Services Section.

Mary Frances Roberts, Administrative Assistant in the Executive Office of the Attorney General in Juneau. Mary Frances previously worked with the Violent Crimes Compensation Board.

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AAG Laura Hartz, who joined the Child Protection Section. Laura graduated from the University of Oregon School of Law in 2005 and then spent a year working for a superior court judge prior to coming to Alaska.

Regina Hobbs, LOA I in the Juneau Labor and State Affairs Section.

Congratulations to:

AAG Rebecca Cain who will be "transferring" within the Torts and Workers' Compensation Section from handling the state's defense of employee workers compensation claims, to defending the state and state employees in tort claims. She will transition between these duties during the next several months.

Erika Moore on her promotion to Law Office Assistant II in the Collections and Support Section.

Farewell to:

AAG Darin Goff who resigned from the Child Protection Section in order to return to Utah. His last day will be November 9.

AAG Anne Bandle and LOA II **Michelle Harris** in the Collections and Support Section; Michelle obtained a position as a paralegal with the Corps of Engineers.

AAG Sabrina Fernandez who resigned from the Natural Resources Section to take a part-time position in the private sector.

CIVIL DIVISION

Child Protection

New litigation. *Kaltag v. Jackson* is a case against state officials recently filed in the U.S. District Court in Anchorage. Kaltag is an Alaska

Native village. Hudson and Salina Sam obtained an order from the Kaltag Tribal Court making them the adoptive parents of a child. Previously, the tribal court had terminated the rights of the child's parents. The Bureau of Vital Statistics refused to issue the Sams an amended birth certificate listing them as the child's legal parents. This suit seeks a judgment declaring that the village is a federally recognized tribe with the inherent authority to terminate parental rights and to issue tribal adoption orders that are entitled to full faith and credit. Plaintiffs also seek an order requiring the state Bureau of Vital Statistics to issue the adoptive parents an amended birth certificate that lists them as the child's legal parents. The main issue raised by the case is whether tribal courts of Alaska Native villages without reservation land have the legal authority to initiate child protection cases that can lead to the termination of parental rights and to issue adoption orders entitled to be given full faith and credit by the state. AAG Jan Rutherford is assigned to this case.

The state is currently defending a similar case in the Anchorage Superior Court. In *Tanana et al. v. State*, other Alaska Native villages are seeking a declaration that they have the inherent authority to initiate child protection cases. The parties are currently briefing cross motions for summary judgment. Senior AAG Dan Branch continues to handle this matter even though he recently transferred to another section.

New CINA Cases. New CINA cases of note for the month of September, based upon allegations in OCS petitions:

A mother was driving under the influence with her daughter in her car. She had a .168 BAC and the child was not in a seat belt. An older child had been in state custody as a result of physical and emotional abuse. The children alleged that their mother would drink or use meth and would leave them for weeks at a time. When she was around she would fly into rages, often hitting the children and causing them to be injured. The mother also failed to take one child to the

dentist, even though her face was swollen and hot to the touch. More recently, both parents and the children tested positive for cocaine. Although the parents were given an opportunity to participate in substance abuse treatment, they failed to do so, resulting in the OCS' removal of the children from the parents' care.

OCS attempted to give services to a couple whose four older children have been in state custody since 2005. The services were intended to address substance abuse, domestic violence, and homelessness issues. Despite these services, the couple seemed unable to access food bank food or to participate in domestic violence treatment. The mother repeatedly returned to the father, despite incidents of domestic violence. Just prior to the birth of a new child the mother expressed an intention to kill herself and had to be rescued from a bridge off which she threatened to jump. After her latest child was born, OCS took the baby into custody.

Police responded to a 911 hang-up call. When they arrived they heard children crying for their mother inside the apartment. One of the children opened the door. Officers found three children, ages 3, 2 and an infant. The 3-year-old said her parents were fighting and had left the home. The children were taken into custody.

Troopers responded to another 911 hang-up call. They arrested the mother on DV charges. During the investigation they found marijuana plants, weapons and ammunition. They arrested the father on drug charges. They then found a 4-year-old child hiding among the marijuana plants. OCS took the child and a sibling into custody.

In July 2005, OCS took two children into custody as a result of their mother being taken to the hospital by ambulance for substance-induced psychosis brought about by intravenous methamphetamine use. Both parents admitted to using meth. Despite services provided to the

parents to battle their substance abuse problems, they continued to use, and a petition for termination of parental rights will soon be filed. When a new child was born in September, OCS took custody of this child and placed the child with a grandmother.

A mother left her 1-year-old and 3-year-old children in her home and did not inform anyone of her location. The following morning the mother's roommate awoke to find the children unattended. That evening the roommate contacted APD and OCS so they could place the children in foster care. The mother finally contacted OCS 2 days after she left, saying she was out with friends and she could not contact her residence because her cell phone was dead.

OCS took custody of a 2-year-old child after the mother was arrested for DWI with the child in the car. During its investigation, OCS found out that the parents of the child had been involved in a domestic violence incident two weeks before during which both parents were extremely intoxicated. It was reported that the father assaulted the mother by hitting her with a guitar, punching her, and choking her, and that he had threatened to kill himself. Police officers reported the mother suffered extreme deep bruising on both arms, a laceration on her triceps, facial bruising, and bruises on the neck and throat. The mother reported she lost her job because she failed to go to work because her face was so bruised. Both parents were incarcerated when OCS took custody.

Ongoing Cases. At the end of August AAG Poke Haffner retried a case after a reversal and remand by the Alaska Supreme Court. The father's attorney, not eager to have several days of laborious and excruciating testimony, proposed that there be a stipulation to the admission of various exhibits and to a "timeline" setting out the significant events in the case. In addition, the parties stipulated to the contents of a visitation calendar prepared by OCS. This limited testimony to two days. The basic issue was abandonment – the father in Texas had missed

about 3/4 of his telephonic visits with the child, who turned six in September. OCS arranged the calls for the father's convenience to be placed to him at a phone he designated. It took the father a year to obtain a substance abuse assessment and another eight months to complete an eight-session anger management class, both required as a part of his case plan. He failed three home studies required under the Interstate Compact for the Placement of Children because he lived outside Alaska.

Judge Blankenship issued an order terminating parental rights, based partially upon the child's young age, the father's lack of participation in visits needed to form a relationship with the child, and the child's serious behavior problems (ADHD likely exacerbated by FASD and cocaine exposure in utero) that the father was unlikely to be able to address. This child has been adopted by the foster parents who also adopted a sibling. The adoption was not set aside after the remand.

AAG Haffner also had a hotly contested temporary custody hearing. The case involved two girls (13 and 16-years-old). Their father is a registered sex offender and is still on felony probation from convictions resulting from his molestation of the mother's sister and an older daughter in the past (when those women were the ages of these girls now). The victims did not report until they had become adults and compared notes and realized the father had abused both of them. The thirteen-count indictment of sexual abuse committed over a several year period, including several first degree counts, was resolved by a single SAM2 in a plea. He was released in November 2004, violated probation/parole (cocaine) in July of 2005, was reincarcerated, and was ultimately sent back to his village by the Parole Board in November of 2005.

The mother "trusts him." Despite carefully brokered deals involving the mother's promise never to let him be out of her immediate supervision around the girls, he was alone with

them on occasions when the mother had other obligations – leaving the village for work, or berry picking and other activities. The case was precipitated by a report that the sixteen-year-old, intoxicated, was in the road in front of the house screaming about her father messing with her sister. OCS investigated but neither girl would corroborate abuse. Based on the obvious risk, OCS filed a petition for adjudication. At the temporary custody hearing it developed that the father's unsupervised contact with this daughters was a violation of a probation term, and he has been ordered to present himself at the probation office as a result. He will have yet another sex offender assessment and will probably be ordered to remain in Fairbanks for an 18-month (or so) treatment program.

The parties ultimately agreed to a complicated care and safety plan to ensure the safety of the children when the father is in the village. The plan relies upon the cooperation and commitment by the tribe to supervise contact between the father and the children.

Other Activities. AAG Gayle Garrigues and AAG Poke Haffner gave a second presentation to Fairbanks CINA mediators with emphasis on the Indian Child Welfare Act. Karen Largent, director of the CINA mediation program, expressed her appreciation for all of the work AAGs Garrigues and Haffner have done for her program.

AAG Jan Rutherford (and AAG Dan Branch from the Commercial Section) participated in a 2-day meeting of a workgroup formed by the Rural Justice Commission. The mission of this workgroup is to recommend language for a model MOU between federal, state and tribal entities concerning the disposition of ICWA cases in the State of Alaska. AAG Rutherford will be participating in weekly teleconferences until December, when another day-long meeting will take place.

Commercial and Fair Business

Consumer Protection/Anti-Trust

United Egg Producers Multistate Settlement.

Alaska and 14 other states accepted an Assurance of Voluntary Compliance with United Egg Producers regarding the use of a logo that appears on egg cartons. The states claimed that the logo, which read "Animal Care Certified," was misleading because it suggested a quality of care that was inconsistent with actual conditions for egg producing hens, which included debeaking, forced molting, and confinement in crowded wire cages. UEP agreed to stop using the logo and to not misrepresent the level of care given to hens, and made a payment of \$100,000 to the states.

Consumer Protection Public Service

Announcements. With a stipend from the National Consumer League, the Attorney General's Office sponsored a PSA radio campaign focusing on foreign lottery fraud. The PSAs, in English and Yup'ik, were aired primarily in association with the program Native America Calling. The PSA's were broadcast from September 4 through September 18.

Department of Revenue, Tax Division

SOA V. Lloyd Reese. Reese was a licensed pull-tab operator between 1994 – 1997. He was required to provide a bond to the State under AS 05.15 in a certain amount or some other security in lieu of the bond. Ultimately, Reese provided the State with a deed of trust note and deed of trust for \$100,000 secured by a piece of real property located in the Palmer Recording District. In April 1998, the State issued an audit report for the years 1994 – 1997 which resulted in a Notice of Violation for these years as well as a Notice of Revocation of Reese's gaming operator's license. The State had determined that he was liable to his permittees in the sum of \$218,578.19 plus interest for amounts he

underpaid the permittees. Reese appealed the revocation and the decision that he underpaid his permittees. An Informal Conference Decision was issued in September 1998 finding him liable for the \$218,578.19 and affirming the revocation of license. Reese appealed this decision and on December 7, 1999, an Order Granting Motion for Summary Judgment was issued affirming the prior informal decision.

In November of 2004, the State filed a Complaint for Judicial Foreclosure requesting the right to foreclose on the real property secured by the deed of trust and for a deficiency judgment against Reese. The State's Complaint is grounded on the 1999 decision. Reese filed a motion for summary judgment arguing that the State's claim is barred by the 6 year statute of limitations. AAG Beardsley filed an opposition and cross-motion for summary judgment for the \$218,578.19. In the opposition the State argued that the limitations period was interrupted by the doctrine of equitable tolling while the administrative appeals were going forward.

On the eve of trial, scheduled for September 18, 2006, the parties reached a settlement. Reese has agreed to pay the State \$125,000, with \$100,000 of it coming from the sale of the real property securing the State's deed of trust. The remaining portion must be paid by September 1, 2010. Reese has signed a Confession of Judgment for the full \$430,000 owing with the understanding that if he pays the \$125,000 before 2010, the State will forego the remaining portion of the debt.

Division of Insurance

On September 25, 2006, Mr. Fadey Kuzmin plead no contest to theft in the second degree (a Class C felony offense), a charge arising out of an investigation by the Division of Insurance for insurance fraud. Mr. Kuzmin set off a multiple vehicle collision and immediately renewed his automobile insurance without disclosing he had just been in a collision. His

insurer State Farm paid his claim, (in excess of \$12,000), but the investigation by the Division of Insurance confirmed he had failed to disclose that the accident occurred prior to coverage. As a first time offender, Kuzmin was given five years probation but was ordered to pay restitution of \$12,400. This is the third felony level conviction obtained by AAG Daniel Wilkerson, since he began with the Civil Division at the end of January, with over \$47,000 of restitution being ordered by the court to be paid.

Division of Corporations, Business and Professional Licensing

Hearings

In Re Ilardi. AAG Karen Hawkins recently went to hearing in a medical board discipline case involving a local psychiatrist. The case arose out of a report in 2003 by an adolescent residential treatment hospital that it had temporarily suspended the privileges of the psychiatrist due to reports of unprofessional conduct by the psychiatrist towards two female staff members. Within a week after the suspension, the psychiatrist resigned his position on the medical staff and left the state, moving to Maine.

After investigation by the Division of Corporations, Business and Professional Licensing and referral to the AG's office, an accusation was filed and a hearing was requested. On August 28th, AAG Hawkins began presenting her case by calling the two female complainants. Both complainants described in detail the psychiatrist's attempts to engage them in sexual acts against their will, which included the psychiatrist exposing himself to them, attempting to force a sex act with them, and grabbing their body parts. AAG Hawkins finished her presentation that day by calling three other witnesses.

The next day, AAG Hawkins called a doctor from the adolescent residential treatment hospital

to the stand. The doctor testified about doctor/patient relationships, the hospital's investigation, and the complaints made by the two female staff members. The doctor was subjected to a particularly grueling cross-examination by the psychiatrist's counsel regarding the physical problems older men with diabetes and cardiovascular problems have with respect to sexual performance, in an attempt to impeach the testimony of the female complainants.

The doctor did a wonderful job standing up to the cross-examination. Just as the hearing was to resume that afternoon, the psychiatrist's counsel informed AAG Hawkins and the hearing officer that the psychiatrist wished to discontinue the hearing and that he agreed to surrender his Alaska license. Apparently, the psychiatrist had heard enough as he had listened to the entire proceeding by telephone from Maine!

The outcome in this case was a victory for the two female complainants because they can finally put the painful memories of what the psychiatrist did to them behind them. The psychiatrist formally surrendered his license in September and the matter will be before the medical board for acceptance in October.

Settlements

On September 19, 2006, the Division of Corporations, Business and Professional Licensing (Division) reached a settlement with Anchorage landscaping contractor Titan Enterprises LLC to avoid going to hearing on Titan's challenge to a \$1000 administrative fine assessed against it for violating AS 08.18.011(a) (working as a contractor without a license). Pursuant to AS 08.18.125 (which became effective June 21, 2006), the Division can impose an administrative fine of up to \$1000 for a first violation of AS 08.18 (regulating construction contractors and home inspectors), subject to a hearing process if the alleged violator challenges the fine. Due to the fact that the Notice of Administrative Fine specifically provided for a

negotiated settlement of up to 70% of the fine if the contractor obtained the proper license within 15 days, and due to the fact that Titan was able to get its lapsed license renewed the same day that the fine was issued, the parties agreed that Titan's payment of \$300 would settle the matter. AAG Robert Auth represented the Division in this proceeding.

Human Services

Litigation Update

DLC v. API was settled after the release of the investigative report.

Active settlement discussions are underway in several cases, including **Solski and Krone/Pierce**. Both of these Medicaid matters relate to allegations around deficient notices and the issue of material improvement, which was defined by the legislature last session.

The remaining Medicaid cases are **Bayless** and **Snyder**. All outstanding issues in Bayless (deficient notice) have been resolved, but Snyder is a bit difficult due to the complexities of determining eligibility for TEFRA (a specialized eligibility criteria in Medicaid).

The section was served with an injunction in the **Baker** matter (PCA services). The briefing will be done by the middle of October with Oral Argument on October 25. AAG Stacie Kraly traveled to Anchorage last week to meet with legislators to discuss this case and the potential fiscal impacts.

Finally, the CON program is still resulting in some activity related to the definition of an Independent Diagnostic and Testing Facility (IDTF). In August, Judge Steinkruger ruled against DHSS on the regulatory definition of IDTF. This however, has resulted in the Commissioner having to reverse decision on two other similar facilities in the Anchorage/MAT-SU area which may lead to further litigation.

Medicaid

Subrogation/Liens

Since the last report 77 files have been closed and 79 new files have been opened. At the present time, there are 618 open Medicaid lien/subrogation matters and the section has tracked the resolution of 443. Calendar year-to-date collections are \$1,496,474.73, with \$18,009.90 in collections during September so far, as a result of eight case resolutions.

Licensing

AAG Rebecca Polizzotto concluded a 2-day day care license revocation hearing in Juneau and is awaiting a decision. She settled her next hearing and is working on possible resolutions for the two remaining scheduled hearings. There is an inordinate amount of day-to-day work in the licensing area. AAG Polizzotto is working on a week long training for all licensing workers in October. DHSS is thrilled to have a full-time licensing worker assigned to their matters.

Labor and State Affairs

Alaska Public Offices Commission

The APOC had its Fall quarterly meeting on September 21 and 22. It heard a number of matters, including Representative Eric Croft's request to expedite his and Representative Crawford's complaint that Alaska's Future, Inc. (which has been active on the gas reserves tax initiative), is not registering and reporting its contributions as a group under the campaign finance law. The commissioners denied the request to expedite but did schedule a hearing on the complaint for October 11. AAG Margaret Paton Walsh will be representing the APOC staff.

Elections

Edgmon v. Division of Elections. AAG Sarah Felix represented the Division of Elections and

Director Whitney Brewster in this original action in the Alaska Supreme Court challenging the ballot recount finding that Carl Moses won the Democratic primary for State Representative for District 37. The Court reversed the division's decisions regarding five ballots, resulting in a tie between incumbent Moses and challenger Edgmon. The race will be determined by a flip of the coin on September 25.

Employment

Crowley v. State of Alaska, Office of Children's Services. After granting summary judgment in this employment discrimination case, Judge Morse awarded the State \$14,601 in costs and attorney's fees on September 8. AAG Richard Postma represented the state.

Labor

ABC v. State. On September 15 Judge Rindner denied AAG Larry McKinstry's motion to dismiss in this challenge against the Department of Labor and Workforce Development's grants of STEP funds to union apprenticeship programs. ABC's complaint is that the department should not provide such funds to entities with alternative sources of funding because AS 23.15.651(b) prohibits the payment of STEP grants to a training entity if the proposed use is to "displace money available through existing public or private training programs."

Labor Relations

State v. Confidential Employees Association. On September 11, the Alaska Labor Relations Agency issued its decision in the state's petition to remove 10 senior human resource managers from the confidential employees unit. ALRA rejected the state's arguments that (1) the 10 positions (as supervising managers) were ineligible for bargaining under AS 23.40; (2) the employees' supervisory duties precluded their participation in a bargaining unit with nonsupervisory employees; and (3) their unit placement conflicted with their

supervisory and managerial duties. AAG Jan DeYoung represented the state before ALRA.

General Services & Supply (Department of Administration)

GCS v. State. This breach of contract action by a computer hardware vendor was tried in Fairbanks in May. On September 22, Judge Woods heard argument on a number of post-trial motions. The court granted reconsideration of its denial of GCS's motion for a new trial, granting part of the motion after concluding that the court had improvidently granted part of the state's motion for summary judgment because an additional issue required a hearing. A scheduling conference will be held October 31. AAG Bill Milks, with support from AAG Margie Vador, is representing the state.

Office of the Governor

Holmes v. State of Alaska. This is an administrative appeal to the superior court from a denied request for public records from the Office of the Governor. The dispute was over whether the public record existed. Judge Morse found in the State's favor and dismissed the appeal on Sept. 20. AAG Richard Postma represented the state.

Retirement and Benefits

Alaska Civil Liberties Union v. State. Judge Joannides heard argument on the regulations the Department of Administration has proposed to implement the Alaska Supreme Court's order to extend spousal benefits to employees with same-sex domestic partners and determined that the eligibility criteria, when considered as a whole, were unduly restrictive in violation of the Supreme Court's order and the state constitution. The proposed regulations are set for public hearing in late September. AAG Gina Ragle is representing the state.

In re Randolph Mitchell. On September 8 the Office of Administrative Hearings issued a final

decision affirming the PERS Administrator's denial of this application for occupational disability benefits. Mr. Mitchell failed to show that he had a work injury permanently preventing him from returning to work. AAG Toby Steinberg represented the Administrator in this action.

Special thanks. To AAG Joan Wilkerson for her help with educational and miscellaneous matters for *Moore* team members during their final stretch before trial.

Legislation and Regulations

During September 2006, the Legislation and Regulations Section spent an active month preparing for and conducted the annual regulations training classes in September 2006 for state agencies and assistant attorneys general in Anchorage and Juneau.

The section also performed legal reviews of several regulations projects, including: (1) Board of Registration for Architects, Engineers, and Land Surveyors (reexamination deadlines; examinations; postponements); (2) Department of Education and Early Development (district-operated statewide residential educational programs; adequate yearly progress and student subgroups); (3) Commercial Fisheries Entry Commission (fees concerning reconsideration and administrative error); (4) Department of Commerce, Community, and Economic Development (municipal energy assistance); (5) State Medical Board (foreign medical graduates; continuing education, discipline; and other matters); and (6) Board of Barbers and Hairdressers (licenses; apprenticeships; and miscellaneous amendments).

The section also edited legislation for consideration for 2007 legislative session.

Natural Resources

Pasternak v. CFEC. On September 27, AAG John Baker filed the state's brief in the Alaska Supreme Court in this appeal from a decision denying Pasternak a limited entry permit for the Northern Southeast Inside (Chatham Strait) sablefish longline fishery. The issues raised are controlled by the decision in *Simpson v. State, CFEC*, 101 P.3d 605 (Alaska 2004), which rejected regulatory and constitutional challenges to the CFEC's determination of the maximum number of permits for the fishery.

May v. CFEC (Southern Southeastern Inside Sablefish longline fishery) and May v. CFEC (Southern Southeastern Inside Sablefish pot fishery). The State received two favorable decisions on August 24, 2006 from the superior court in Ketchikan in two separate administrative appeals. The CFEC's decisions were affirmed in both cases on all issues.

In each case, the superior court upheld CFEC's findings that May was not eligible to apply for a limited entry permit for the Southern Southeastern Inside Sablefish longline or pot fisheries. The court also agreed that May's claims for skipper participation points and points for vessel investment in each fishery failed. In addition, the court held that May did not have standing to challenge the maximum number of longline and pot fishery limited entry permits set by the CFEC, and even assuming that he had standing, he failed to prove the merits of his claims.

The State has moved for awards of attorney's fees in both cases. Former AAG Stan Fields briefed these cases and AAG Vanessa Lamantia now represents the State in these matters.

Roadless Rule. A decision was issued in the multi-state litigation over the State Petitions Rule that concerns the management of more than 58 million acres of inventoried roadless areas in the national forests. Four states and 20 environmental organizations sued the US Department of Agriculture seeking to invalidate the

State Petitions Rule, which was the rule promulgated after the Wyoming District Court enjoined the prior rule, known as the Roadless Rule. The plaintiffs sought to have the Roadless Rule reinstated, but without an amendment adopted as part of a settlement of Alaska's suit over the Roadless Rule that exempted the Tongass National Forest from its application.

The magistrate judge presiding in the case in the Northern District of California issued a 55-page opinion and order granting the plaintiffs summary judgment, setting aside the State Petitions Rule, and reinstating the Roadless Rule, including the Tongass amendment. The decision enjoins the Forest Service from taking any action contrary to the Roadless Rule until it complies with NEPA and the ESA. The judge found that the Forest Service had to undertake a full NEPA analysis to repeal the Roadless Rule, and also that a section 7 consultation under the ESA was required. The judge said: "The Court is mindful that the forest plans were subject to NEPA analysis, but neither that fact nor the holding in *Kleppe* excuses the failure to comply with NEPA where a nationwide Rule has been repealed and replaced with a less environmentally protective scheme." She also said, "The threshold for triggering the ESA consultation process is low" and "applies broadly to 'any action authorized, funded or carried out by' a federal agency." Since the Forest Service did not do either NEPA or ESA, it violated both acts.

The parties were directed to submit a proposed stipulated injunction by October 4. Instead, one intervenor defendant, a timber company, has already filed a notice of appeal, and the government filed a notice of compliance, revealing its directive to the Forest Service, which was to refrain from taking any further action contrary to the Roadless Rule, but which opined that current programs already approved and under way were not affected.

In response, the plaintiffs filed an emergency motion for clarification, claiming that allowing the

existing projects to proceed would violate the court's order. The government has responded alleging that application to the existing projects would be retroactive and would implicate actions that are not "federal action" because the projects are being completed by contracts with third parties and no federal action is involved at this point. The court has ordered further briefing on an expedited basis.

Opinions, Appeals and Ethics

Ethics

For ethics matters, most of the work accomplished and advice given is confidential by law. However, it can report that at the request of the governor's office, the section prepared two advisory opinions to agency heads and senior staff outlining Ethics Act issues that may arise when a state officer is seeking private employment while still in state service and the restrictions applying to post-state employment. The section also provided an advisory opinion to the Alaska Public Broadcasting Commission regarding how to address certain conflicts of interest. No new complaints were received for the month. Three requests for conflict waivers were granted this month.

Appeals

Briefs

AAG Judy Bockmon filed an appellee brief for the Child Support Services Division in an appeal by a child support obligor. The appellant challenged a superior court's refusal to allow him to appeal a decision of an administrative law judge confirming his child support obligation, because he attempted to appeal four months after the 30-day deadline had expired.

AAG Megan Webb filed an appellee brief in a case brought by the father of a child who was found to be a Child in Need of Aid. The father sued the social workers involved in the case, alleging that they interfered with his constitutional

right to be free from unreasonable government interference with his parent-child relationship. The trial court ruled for the state on grounds of collateral estoppel and immunity, and found no constitutional violation, and the father appealed.

Other Matters

AAG Dave Jones received many helpful comments on proposed regulations to establish procedures for handling complaints against hearing officers and administrative law judges. In response to the comments, Dave is making changes before the regulations will become final.

AAGs Paul Lyle and Dave Jones attended initial meetings of Rural Justice Commission work group on alcohol jurisdiction on September 18-19. During the two-day meeting, the workgroup developed a list of 21 potential recommendations and rated them in order from least to most controversial. The workgroup decided to take up the least controversial items first and work through to the more difficult items. The workgroup meets every week throughout the fall and is to make recommendations to the commission on December 1, 2006.

Led by AAG Mary Lundquist, Opinion, Appeals and Ethics section members revised the department's Attorney General opinion policy. The Attorney General has implemented the policy and it is now in effect.

Regulatory Affairs and Public Advocacy (RAPA)

Hearing

U-05-43/44, GHU/CUC rate case. Golden Heart Utilities and College Utilities Corp. are investor-owned water and sewer utilities serving the Fairbanks area under their holding company, Fairbanks Sewer and Water. The two utilities filed a rate case before the RCA seeking to apply a requested 13% water rate increase and

a requested 12% sewer rate increase as postage stamp rates across both the utility service areas. the case went to hearing in Fairbanks, concluding on September 8, 2006. RAPA's witnesses addressed three primary issues: cost of capital/rate of return, allowance for rate case costs, and the proposed use of a year-end test year. The parties presently await the Commission decision.

Stipulated Settlement

U-05-103, ASU rate case. Prior to a scheduled October 3, 2006 hearing, RAPA and Anchorage Sewer Utility agreed to a stipulated settlement of numerous issues, the details of which are presently being reduced to writing. RAPA expects to hold the utility's return on equity below 10% while conceding some adjustments to revenue requirement on payroll, IT expense and pension liability. As a result, the utility's ultimate rate increase should not exceed that already granted by the Commission on an interim basis. Once filed, the Stipulation is subject to Commission approval.

New Case

U-06-105, Fairbanks Gas Complaint v. Enstar. Fairbanks Natural Gas Co. (FNG) filed an emergency complaint to the RCA on September 19, 2006, seeking natural gas service from Enstar beginning October 1, 2006. FNG seeks Enstar gas supply because its present contract provider, Aurora Gas LLC, indicated that it would cease delivery of gas to FNG. FNG owns a liquefied gas plant at Point Mackenzie from which it transports LNG to approximately 800 Fairbanks customers. Enstar currently transports, but does not supply, FNG gas to the Point MacKenzie plant. An initial hearing to address issues is scheduled for September 26, 2006.

Intervention Summary Update

As of September 25, 2006, RAPA is involved in seventeen dockets before the RCA. That number includes sixteen adjudicatory matters in which the

Attorney General has elected to participate as a party and one rulemaking proceeding in which RAPA has participated in ongoing workshops. RAPA also monitors numerous other matters before the RCA for prospective participation as a party, and provides policy analysis to the Attorney General, and through the Attorney General to the Governor's Office, as requested.

Transportation

Parking garage launched. AHFC contracted with the Municipality of Anchorage to purchase a parking garage, to be constructed across the street from the Atwood Building. The Municipality of Anchorage exercised its rights for construction of the garage under an existing agreement with the developer of the new Anchorage convention center. The garage will serve the Atwood Building, and will also assist convention center users. AAG Joan Wilson, with support from AAGs Jeff Stark and Jim Cantor, represented AHFC and the Department of Administration.

New SOB. The Department of Administration purchased the old Palmer Hospital. The building will be converted to a new State Office Building to house court system and other state agency offices. AAG Joan Wilson, with assistance from AAGs Jeff Stark and Jim Cantor, represented the Department of Administration. During the closing of this real estate transaction, AAG Wilson was particularly struck by the wistful sentiments of former hospital employees who had spent their entire careers working in the historic facility and remembrances of the births, deaths and other life-changing events since the hospital was opened in the 1930's.

Knik Arm Bridge and Toll Authority plans progress. The Knik Arm Bridge and Toll Authority published a draft environmental impact statement for public comment. It also finalized a memorandum of agreement with the Alaska Department of Transportation and Public Facilities

outlining future responsibilities for the construction and maintenance of a Knik Arm Bridge and various roads in Anchorage and the Mat-Su Borough leading towards a bridge. AAGs Jim Cantor and Peter Putzier have assisted with this project.

Construction claim dismissed. Rand Construction filed a lawsuit seeking additional compensation for work performed on the courthouse parking garage in Anchorage. The superior court dismissed the lawsuit because Rand had not pursued its claim in the appropriate administrative forum. AAG Jim Cantor represented the State.

Torts and Workers' Compensation

Police excessive force appeal. AAG Dale House filed appellants' brief in *Patrick v. SOA*, an excessive force case involving use of a taser. In addition to challenging the excessiveness of the Bethel jury's \$1,000,000+ verdict, the state requests the Court to update its ruling in *Samaniego v. City of Kodiak* which effectively eliminates the defense of qualified immunity in excessive force cases. (This issue is also before the Supreme Court in another police liability case – *Sheldon v. City of Ambler*). The state also requests reversal of the trial court's determination that AS 09.17.010's caps on non-economic damages violate the equal protection guarantee of the Alaska Constitution.

Summary Judgment Granted in AST case in Palmer. Complete summary judgment was granted in favor of the state in *Martin v. State of Alaska, Department of Public Safety*. Plaintiffs (husband and wife) argued that the state troopers had a duty of care to respond to and prevent a reported threat of harm posed by a male friend of the plaintiff wife. After voicing concerns to AST about an earlier contact, plaintiff husband was injured at a bar when a vehicle driven by his wife's friend backed over him. The plaintiff wife had called her friend for a ride and was a passenger in the truck at the time. The friend was the person about whom the plaintiffs had earlier complained to the troopers. The

court, Superior Court Judge Eric Smith, agreed with the state that the troopers had no duty of care to respond to the earlier complaint because plaintiffs' notification of a threat was not specific enough to rise to the level of particularity needed to give rise to a duty to protect. The State's defense was handled by AAG Stephanie Galbraith Moore.

Statutory Punitive Damages issue. In *Reust v. Alaska Petroleum Contractors*, Judge Huguelet ruled on the issue of the State's entitlement to 50% of a punitive damages award in a settlement context. After a jury awarded punitive damages to Reust, the State intervened in the lawsuit to protect its statutory right to 50% of the punitive damages award pursuant to AS 09.17.020(j). Reust appealed, challenging the constitutionality of the statute. The Supreme Court upheld the statute, but remanded for recalculation of the awarded damages. On remand, Reust and APC attempted to settle and dismiss the case, without the participation or consent of the State. The State opposed on the ground that the State was a party with a vested interest in 50% of the punitive damages award and that the case therefore could not be dismissed over our objection. Judge Huguelet agreed and denied the Reust/APC motion to dismiss, finding that the State's interest in the punitive damages began when the jury's verdict was published and that granting the motion to dismiss would frustrate the purpose of AS 09.17.020(j).

Judge Huguelet also granted the State's motion to dismiss in a closely related case involving these same issues. In this second action, Reust filed for declaratory relief seeking a ruling that the State was not entitled to any portion of the Reust/APC settlement moneys in *Reust v. Alaska Petroleum Contractors*. The court declined to exercise its discretionary jurisdiction over plaintiff's action, noting that the action would not serve any useful purpose and was moot in light of the court's resolution of the substantive issue in the original *Reust* action. Both of these cases are being handled by AAG Ruth Botstein.

Jury finds for the Department of Corrections. A jury in Anchorage returned a defense verdict in *Schug v. State (DOC)*. Plaintiff alleged that his leg restraints were too tight during his transport from Alaska to Alaska's Contract Facility in Arizona and that as a result he suffered permanent damage to his legs. The trial court, Superior Court Joannides, earlier denied DOC's motion for summary judgment which argued that plaintiff was alleging a battery, and the state is immune under AS 09.50.250(3). She allowed plaintiff to go forward at trial on a negligence theory. The case was defended at trial by AAG Stephanie Galbraith Moore, with assistance from AAG Ruth Botstein, and paralegals Patricia Anderson and Kimberly Halstead. It is unknown at this time whether Plaintiff will lodge an appeal.

CRIMINAL DIVISION

Anchorage DAO

Jerry Daniel McClain sentenced to mandatory 99-year sentence for torture during murder of girlfriend.

On September 21, 2006, Judge Michael Wolverton imposed a mandatory 99-year sentence on Jerry Daniel McClain in the death of Kiva Friedman.

On April 26, 2003, Jerry McClain had beaten his girlfriend, Kiva Friedman, to death with a baseball bat. He had bound her then beaten her repeatedly with the bat and cut off her hair. He told police he had held a mirror to her face during the beating, telling her to look at herself and saying, "Now, no man will want you."

McClain had pleaded no contest to murder in the first degree on April 10, 2006. Following the plea, Chief ADA John Novak presented evidence to prove that McClain had not just killed Friedman, but tortured her during the killing. While the sentencing range for murder in the first degree is 20-99 years, if the state proves by clear and convincing evidence that the murder involved torture, the murderer is subject to a mandatory 99 years in jail. At the sentencing on

September 21, Judge Michael Wolverton ruled on the state's evidence and concluded that McClain had engaged in torture during the murder. Judge Wolverton imposed the mandatory 99 year sentence.

Jack Morrell convicted of importation of liquor in violation of local option.

On November 11, 2003, a trooper with the Western Alaska Alcohol and Narcotics Team was at Anchorage International Airport when he saw a man checking in a box for shipment to St. Mary's via Hageland Aviation. From the man's handling of the box, the trooper could see that the box was very heavy for its relative size. He asked the man for consent to look in the box and the man consented, explaining that he was not flying to St. Mary's, but was only delivering the box to the airline for shipment to his father in St. Mary's. The trooper found 24 plastic bottles of liquor in the box. The bottles had been "burped." To "burp" a bottle means to loosen the plastic cap enough to enable a person to squeeze the air out of the bottle and then re-fasten the cap to prevent the liquor inside from sloshing around so that law enforcement officers or shippers cannot hear that the content of the shipping container is liquid and probably liquor.

The trooper called the man's father in St. Mary's, who told him he had asked his nephew, Jack Morrell, to ship him three to four bottles. The trooper then called Jack Morrell directly. Morrell admitted he packaged the 24 bottles for shipment to St. Mary's and he knew St. Mary's was a "dry" town, a local option community that had voted to ban the sale and importation of alcohol in 1981. ADA Dan Shorey tried the case for the state before Superior Court Judge Eric Aarseth and the jury returned a guilty verdict.

On February 27, 2004 Jack Morrell stabbed a man to death during an argument after Morrell ran into the back of the other man's vehicle while waiting in the drive-up line at Taco Bell in Anchorage. ADA Adrienne Bachman convicted him of murder in the second degree on July 10, 2006. Morrell is awaiting sentencing in both cases.

Off-duty officer catches felony DUI driver.

At about 6:48 on the evening of August 2, 2005, APD Detective Clint Thomas was driving home from work on the Glenn Highway. A blue Ford Ranger pick-up approached him from behind, jerking toward the side of its lane and drifting over the lines and ridges marking the edge of the highway. At the end of a long working day, Thomas was prepared to ignore the driving. Then the pickup began tailgating him. Again, Thomas was still mostly thinking about getting home. Then, the pickup passed him, accelerating to 95 miles an hour and continuing down the highway at that speed. Unable to ignore the situation any longer, Detective Thomas stopped the vehicle and found James Wilken to be the driver. Wilken, who had two prior convictions for misdemeanor DUI, could barely stand when he got out of the pickup and blew a .088. Wilken went to trial before Judge Michael Wolverton and the jury convicted. ADA Andrew Peterson handled the case for the state.

Fairbanks DAO

The month was taken up with the DAO Conference and the usual crimes in Fairbanks.

Unfortunately, there was a fatality traffic accident on September 9, 2006. A prominent scientist who was visiting Alaska with his wife and son was killed when the vehicle he was riding in was struck from behind by a defendant driving a pick up truck. The victim and his family were pulled over to the side of the road to enjoy the view of the mountains and fall foliage. The pick up drove straight into the parked car.

Witnesses stated that the pick up had been swerving on the road prior to the collision, crossing the centerline and causing an oncoming vehicle to take evasive action. The witnesses also indicated that the truck drove straight into the parked car.

The Trooper investigation found two additional witnesses who had attempted to buy a motorcycle from the pick up truck driver two hours before the accident and observed that he appeared intoxicated.

The misdemeanor unit was busy as usual during September with the usual number of DUI's and trials.

Kenai DAO

Violence by women. Last month saw several significant cases of violence perpetrated by women, and the trend continues this month.

The office has a new attempted first-degree murder case in which a woman lashed out at her significant other. In this case, the woman gunned her car engine, spun the wheels, and ran straight over her boyfriend, not even stopping until the car hit a berm. As he lay on the ground in pain, she turned the car around and aimed it directly at him, as he was attempting to crawl away on two broken and twisted legs. The scene was so dynamic that a witness in a downstairs apartment leaped out the window and ran to his aid, dragging him away just as the car was about to run over his head. The woman was screaming, "I'm going to kill you."

She fled the scene but was soon apprehended by the police based on the bystanders' information. Reports from the hospital are that the victim may lose both legs.

More crimes by women. Not only are women being violent, they're also committing other kinds of crime. Three women were charged with felony drugs. One was indicted for a meth lab after officers reviewed the new pharmacy logs and discovered that she and her sister had purchased Sudafed 14 times in the last month. An investigation led to the discovery of a portable lab on the grounds of her house. Another woman was charged with theft and scheme to defraud when she wrote 133 checks on a closed account. She wrote them all in less than five weeks, averaging five checks a day.

Sexual assault against a minor trial. The office had a child sex abuse trial in which a stepfather molested his stepdaughter over an eight-year period, from the time she was seven until turning 15. He was charged with 17 counts of sexual assault against a minor one and sexual assault against a minor two and was convicted

on all counts. When she was told about the verdicts, the victim (who is 16 now) was amazed. She just sat there, saying, "He always said that no one would believe me." But the jury did.

Assault trial. ADA Will Walton, a recent addition to criminal law, Alaska and Kenai, succeeded in convincing a jury to convict the defendant of assault two and three charges for what the defense attorneys tried to characterize as a "barroom" fight. ADA Walton was able to show them that the fight was much more than that as the victim had tried to flee but the defendant chased him down and kicked and punched him.

Ketchikan DAO

A Ketchikan jury found George Archbold guilty of misconduct involving controlled substance in the third degree and fifth degree. Archbold allowed a police officer into his hotel room where the officer saw several small packages of methamphetamine and so arrested him. Fifteen small bindles of methamphetamine and three packages of marijuana were found. He told the police about his selling methamphetamine and marijuana.

A Ketchikan jury found Roxanne Hallingstad guilty of felony DWI. She was stopped for speeding and found to be intoxicated. A breath test showed a .102 BAC and she had two prior DWIs in 1997 and 1999.

A mistrial was declared in a Craig jury trial for Norman Edenshaw who was being tried for sexual abuse of minor in the second degree. While the jury was deliberating but home for the night, the mother of one of the jurors told her son about Edenshaw sexually abusing other children. After that, the juror felt that he could not longer be fair and impartial. A new trial date has been scheduled.

Kodiak DAO

A 33-year-old Kodiak resident was sentenced to a composite term of 30 months in prison with 11

months suspended following her conviction for misconduct involving a controlled substance in the fourth degree and misdemeanor failure to appear. This defendant was recommended to complete the Department of Corrections' residential substance abuse treatment program at Highland Mountain. She will be on probation for five years following her release on conditions which include that she consumes no alcohol or drugs.

A 27-year-old Kodiak man was given a flat time sentence of 16 months imprisonment following his plea to C felony misconduct involving a controlled substance and C felony forgery. This defendant had assisted another defendant by taking her known forged prescription for oxycontin to the pharmacy and turning it in. This defendant was arrested when he returned to the pharmacy to pick up the prescription. He was charged with attempted misconduct involving a controlled substance in the third degree and forgery for uttering a known forged prescription to the pharmacist.

After having been arrested for B misdemeanor disorderly conduct for shoving another man in the chest in front of a police officer earlier in the evening, a 26-year-old Kodiak man bailed himself out of jail so he could come back and "get" the man "that had gotten him into trouble". When all was said and done this defendant was back in jail charged with third degree assault for knocking the victim down and kicking him in the head outside a local bar — with the whole incident caught on the bar's backdoor security camera. This defendant was subsequently sentenced to 24 months in jail, with 20 months suspended, and placed on probation for five years following his plea to the third degree assault. The disorderly conduct was dismissed.

Palmer DAO

George Macias was sentenced to serve eight years on one count of sexual abuse of a minor in the first degree and will have to register as a

sex offender for the rest of his life. ADA Rachel Gernat prosecuted this case.

Adrian Barr was convicted of assault in the third degree on a police officer for attempting a "suicide by cop." Barr, whose girlfriend called 911 because he was trying to kill himself, ran at one of the responding officers with a knife, yelling for the officer to shoot him. When Barr got to within ten feet of the officer, a fellow officer shot Barr with a taser. At jury trial, Barr's attorney unsuccessfully argued the officer's fear was not reasonable because the officer had a firearm. Barr remains in custody, and his sentencing is set for December 8, 2006. ADA Gernat handled the trial for the state.

The Palmer grand jury indicted Donald B. Voorhis on three counts of attempted murder and seven counts of assault in the third degree. The charges arose from an assault on a civilian and a three day standoff with Alaska State Troopers, which culminated in an exchange of gunfire. The case has been assigned to Judge Eric Smith for trial on November 27, 2006. ADA Suzanne Powell will try this case.

On September 25, 2006, jury selection began in the case of *State v. Joseph S. O'Brien*, where the defendant is charged with criminally negligent homicide for driving a sub-standard truck with a frosted windshield and hitting and killing a man riding a snow machine on the shoulder of the Parks Highway in Houston. ADA Suzanne Powell is the prosecutor.

Robert Sequak was convicted by a Glennallen jury of DUI. This is his second DUI conviction. This matter was handled by ADA Jarom Bangerter.

Patrick Aleman was sentenced to eight years for misconduct involving a controlled substance in the second degree. Billie Rae Deemer was sentenced to 11 years, with six suspended, and ten years of probation on charges of misconduct involving a controlled substance in the fourth degree and misconduct involving weapons in the second

degree. Curt Friedman was sentenced to five years, with one suspended, on a charge of misconduct involving a controlled substance in the second degree. ADA Curtis Martin tried these cases.

Mark Dunder was indicted on charges of sexual abuse of a minor, possession and distribution of child pornography, indecent viewing, unlawful exploitation of a minor, indecent exposure and incest. Dunder photographed girls, sexually abused them and downloaded thousands images of child pornography. He remains in custody on a \$100,000 cash only bail. The investigation is continuing, as other victims are being identified. The prosecutor in this case was ADA Rachel Gernat.

Billy Rogers pled no contest as charged to sexual assault in the second degree, with no sentence agreement, for sexually abusing his 14-year-old babysitter. The victim's DNA was found on his fingernail scraping. ADA Rachel Gernat tried this case.

Debra Marsden, Justin Guido, Torrie Park, Patrick Huddleston, Kellye Coats-Irons, Bradley Irons, Melanie Benvenuto, Timothy Smith, Jeff Justin, Justin Kruger, German Cazares and Christopher Miner were arrested on felony drug charges after a lengthy undercover drug investigation by the Valdez Police Department. The prosecutor for the state was Jon-Marc Petersen.

Martha Harper was indicted on charges of assault in the first degree, eluding a peace officer in the first degree and assault in the third degree (four counts). On August 11, 2006, Harper drove her truck while she was drunk, weaving, tailgating, driving in and out of ditches, passing vehicles on the shoulder and forcing numerous drivers to take evasive actions to avoid collisions.

A Wasilla Police officer attempted to direct her off the roadway and was almost struck. Harper then led officers on a high speed pursuit, during

which she crossed lines, drove in the ditch, struck guard rails and caused more drivers to take evasive action. Harper hit the rear end of a truck on the Glenn Highway, crossed the grassy center median, entered the oncoming northbound lane and collided head-on with a Ford Expedition driven by Jennifer Setters. Setters sustained serious injuries and was taken to Mat-Su Regional Hospital. Harper's blood alcohol level was over .200 during these events. DA Roman Kalytiak tried this case.